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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. ——

THE UNITED STATES OF AMERICA, PETITIONER

v.

OLE BERKENESS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit (R. 71) entered in the above-entitled cause affirming the decree of the United States District Court for the Fourth Division of Alaska. (R. 11.)

QUESTION PRESENTED

Has Section 17 of the Alaska Dry Law, in so far as it relates to the issuance of search warrants for private dwellings, been repealed or superseded by the search warrant provisions of Section 25, Title II, of the National Prohibition Act?

STATEMENT

This suit was brought in the District Court for the Fourth Division of Alaska to abate a common and public nuisance maintained in respondent's dwelling at Fairbanks, Alaska, in violation of Sections 19 and 20 of the Act of February 14, 1917, c. 53, 39 Stat. 903, 907, commonly known as the Alaska Bone Dry Law.

A search warrant was issued for the search of a building occupied by respondent at Fairbanks, Alaska, and for the seizure of any liquor found therein. (R. 24.) The warrant was based on three affidavits stating that intoxicating liquor was kept and stored in the building. (R. 17–22.) The warrant was served by the United States Marshal, who found in respondent's possession on the premises described a large quantity of intoxicating liquor, liquor in the process of being manufactured, a still, and other apparatus used in the manufacture of intoxicating liquor. (R. 27, 28.)

At the trial the Government offered testimony relating to the search and seizure and sought to introduce in evidence the search warrant, the supporting affidavits, and the Marshal's return thereon. Respondent objected and submitted a petition for the suppression of the evidence, which had previously been filed in the criminal case (R. 37), upon the grounds that the building in question was occupied by respondent as his residence and, inasmuch as the search warrant and supporting affi-

davits did not show that the building was being used as a place for the sale of intoxicating liquor, the warrant was void (R. 19, 32, 39, 40).

The affidavits, the search warrant, and the complaint in the suit were all prepared and filed under the provisions of the Alaska Dry Law, and it was the Government's contention that the warrant was valid because under the local law it was unnecessary to allege or show in the affidavits for the warrant that the building described was being used for the sale of intoxicating liquor. (R. 51.)

The petition for the suppression of evidence was granted, the evidence offered by the Government excluded, and the suit dismissed. (R. 11.)

An appeal was taken by the Government to the Circuit Court of Appeals for the Ninth Circuit (R. 58, 59), the assignments of error all being based upon the question whether the search warrant provisions of the National Prohibition Act repealed or superseded those contained in the Alaska Dry Law. (R. 54.) The validity of the search warrant and the sufficiency of the supporting affidavits were never questioned upon any other grounds. The Circuit Court of Appeals affirmed the District Court's decree, the court holding that while "the affidavits were sufficient in their statement of facts to justify (sic) the terms of the Alaska Prohibition Act and to justify the issuance of the search warrant," Congress intended when it adopted the National Prohibition Act that the pro-

visions contained therein for the search of private dwellings should occupy the ground fully and to the exclusion of local laws such as the Alaska Dry Law. (R. 69.)

STATUTES INVOLVED

The National Prohibition Act of October 28, 1919 (c. 85, 41 Stat. 305), and the Act supplemental thereto (Act of November 23, 1921, c. 134, 42 Stat. 222) contain the following provisions respecting repeals.

Section 35, Title II, of the National Prohibition Act:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws.

Section 5 of the Supplemental Act:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; * * *.

Section 17 of the Alaska Dry Law (Act of February 14, 1917, c. 53, 39 Stat. 903), relating to search warrants, provides:

That if one or more persons who are competent witnesses shall charge, on oath or affirmation, before the district attorney or any of his deputies duly authorized to act for him, presenting that any person, company, copartnership, association, club, or corporation has or have violated or is violating the provisions of this Act by *manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away, or otherwise furnishing alcoholic liquor*, shall request said district attorney or any of his assistants duly authorized to act for him to cause to be issued a warrant, said attorney or any of his assistants shall cause to be issued such warrant, in which warrant the room, house, building, or other place in which the violation is alleged to have occurred or is occurring shall be specifically described; and said warrant shall be placed in the hands of the marshal, his deputy, or any town marshal or policeman in any town in which the room, house, building, or other place above referred to is located, commanding him to at once thoroughly search said described room, house, building, or other place, and the appurtenances thereof; and if any such be found, to take into his possession and safely keep, to be produced as evidence when required, all alcoholic liquors and all the means of dispensing the same, also all the paraphernalia or part of the paraphernalia of a barroom or other alcoholic liquor establishment, and any United States internal-

> revenue tax receipt or certificate for the manufacture or sale of alcoholic liquor, effective for the period of time covering the alleged offense, and forthwith report all the facts to the district attorney or his deputy, and such alcoholic liquor or the means for dispensing same, * * *. (Italics ours.)

Section 25, Title II, of the National Prohibition Act, provides:

> No search warrant shall issue *to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor*, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. (Italics ours.)

SPECIFICATIONS OF ERROR TO BE URGED

I. The Circuit Court of Appeals erred in holding that the search warrant provisions of the Alaska Dry Law, in so far as they relate to private dwellings, have been repealed and superseded by those of the National Prohibition Act.

II. The Circuit Court of Appeals erred in sustaining the District Court's ruling that the search warrant which was issued in accordance with the provisions of the Alaska Dry Law was void, and that any evidence obtained as a result thereof should be excluded.

III. The Circuit Court of Appeals erred in affirming the District Court's decree dismissing the suit.

REASONS FOR GRANTING THE WRIT

I. This case presents a question of importance to the United States, namely, whether the search-warrant provisions of the Alaska Dry Law and the Alaska Code are available to it in the enforcement of prohibition in Alaska.

II. The failure of the Circuit Court of Appeals in this case to follow prior decisions of that court has caused considerable uncertainty as to the proper procedure to be followed in prohibition matters in Alaska. This uncertainty is bound to result in continuous controversy, and a decision of this Court is necessary for the guidance of the courts below and the officers charged with the administration and enforcement of the Alaska Dry Law.

III. If the decision of the court below is allowed to stand it will not only deprive the Government of one of the most effective means for law enforcement in Alaska but will render many provisions of the Alaska Dry Law unenforceable and to that extent defeat the plain purposes of the Act.

IV. The decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court on the subject of repeal of a prior special statute by a later general one. (See *Kennedy* v. *United States*, 265 U. S. 344; *Washington* v. *Miller*, 235 U. S. 422; *Rodgers* v. *United States*, 185 U. S. 83.)

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the decree of the Circuit Court of Appeals for the Ninth Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JANUARY, 1927.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 69) has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 15, 1926. (R. 71.) The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

THE SEARCH WARRANT PROVISIONS OF THE ALASKA DRY LAW WERE NOT REPEALED OR SUPERSEDED BY THE NATIONAL PROHIBITION ACT

In *Abbate* v. *United States*, 270 Fed. 735, the court below held that the Alaska Dry Law, although containing more drastic provisions and severer penalties than those found in the National Prohibition Act, was not repealed by the latter act. The court pointed out that in passing the National

Prohibition Act Congress was adopting general legislation for the whole United States to carry out the provisions of the Eighteenth Amendment, while in enacting the Alaska prohibition statute it was legislating solely for that territory and adopting provisions peculiarly applicable thereto. There can be no doubt, the court said, that the National Prohibition Act takes the place of prior general statutes of the United States so far as they are inconsistent therewith, but it does not follow that it repeals the express provisions of the local statute adopted expressly for Alaska. The court further held it is well settled that a law of a territory will subsist and be enforced concurrently with a general law applicable throughout the United States on the same subject. The court then quoted the following well-known rule of statutory construction (p. 736):

> "A general act repealing all acts that are inconsistent with its provisions will usually be construed to refer to general statutes alone and not to include special or local laws.
> * * *
>
> "The presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. The presumption is that the special is intended to remain in force as an exception to the general act, especially where both laws were enacted at the same time or are substantially con-

> temporaneous. * * * Hence it is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of the earlier statute."

This rule has been followed by this Court where similar questions have arisen:

> *Kennedy* v. *United States*, 265 U. S. 344.
> *Washington* v. *Miller*, 235 U. S. 422.
> *Rodgers* v. *United States*, 185 U. S. 83.

The decision reached in the *Abbate case* was later affirmed by the court below in the following cases:

> *Koppitz* v. *United States*, 272 Fed. 96.
> *Simpson* v. *United States*, 290 Fed. 963.
> *Peterson* v. *United States*, 297 Fed. 1000.

In the last case the court said (p. 1001):

> The two laws, National Prohibition Act and Alaska dry law, are in force in Alaska, with the qualification that if there are inconsistencies in any of their provisions, the National Prohibition Act must prevail.
>
> The fact that the penalties may be different for some of the offenses defined in the two acts does not affect the validity of the Alaska statute * * *.

When the court came to consider the instant case, however, it refused to follow its prior decisions on the subject. It completely discarded the rule of statutory construction adopted in previous cases and held that the purpose of Congress in enacting the search-warrant provisions of the Na-

tional Prohibition Act was to cover that ground fully and to the exclusion of local laws on the subject, and that by its action Congress impressed a limitation on the right to search a dwelling which is available to the residents of Alaska equally with those in other portions of the United States. In reaching this conclusion the court said that under neither Act may intoxicating liquor be possessed without a permit. So, the court reasoned, it will not do to accept the argument that the search-warrant provisions of the National Prohibition Act have to do with conditions different and inapplicable to the enforcement of the Alaska Dry Law. Here is where the court erred.

Not only may liquor be possessed under the National Prohibition Act in a private dwelling for certain purposes without a permit, which is not permissible under the Alaska statute, as will be pointed out later, but conditions in Alaska are different and the search-warrant provisions of the National Prohibition Act are wholly inadequate to the enforcement of the Alaska Dry Law, specially enacted to deal with those conditions. The purpose of the Alaska statute and the distinction between the two Acts are well set forth by the court below in the *Abbate case, supra* (p. 736):

> Congress enacted the Bone Dry Law for Alaska, and 20 months later it enacted the National Prohibition Act. In enacting the latter Congress was adopting legislation for the whole United States to carry out the pro-

visions of the Eighteenth Amendment. In enacting the Bone Dry Law, on the other hand, Congress was pursuing its policy of prohibition in Indian country. That policy as to Alaska was first manifested by legislation enacted on July 27, 1868, for the prevention of the importation and sale of intoxicating liquors in Alaska, the population of which was largely composed of Indians, and it was continued without interruption until the enactment of the Bone Dry Law of February 14, 1917. That act contains provisions peculiarly applicable to Alaska, and which are more drastic and far-reaching, and involve severer penalties for the same offense, than do the provisions of the National Prohibition Act.

That Congress intended to enact a statute dealing with conditions peculiar to Alaska is clearly shown by the drastic provisions in the statute itself, as compared with those in the National Prohibition Act adopted for the country in general, and by the debates in Congress on the bill, where it was explained that its provisions, while somewhat drastic, were intended to afford genuine prohibition so as to protect the inhabitants of Alaska, a large part of whom consisted of Indians. (Cong. Rec., Vol. 54, Pt. 3, 2520–2524.)

Having so recently considered conditions in Alaska and adopted legislation deemed suitable for that Territory, it is not likely that Congress, when it came to adopt the National Prohibition Act,

would have changed its views in regard to the need for the drastic provisions which it had inserted in the Alaska law. Section 17 of the latter act is broader in scope than Section 25 of the National Prohibition Act. It permits the issuance of a warrant for the search of a dwelling or other building upon a charge of "manufacturing, storing, or depositing, offering for sale, keeping for sale or use, trafficking in, bartering, exchanging for goods, giving away, or otherwise furnishing alcoholic liquor," while Section 25 of the National Prohibition Act provides for the search of a private dwelling only upon evidence of sale. Obviously, the purpose of inserting more liberal search-warrant provisions in the Alaska Act was to afford effective means for enforcing the drastic provisions of that act. And since Section 17 is broader than Section 25 there is no conflict between the two provisions within the meaning of Section 35, Title II, of the National Prohibition Act and Section 5 of the Supplemental Act, and therefore no ground for holding that by the later enactment Congress intended to impress a limitation upon the right to search a private dwelling in Alaska.

As pointed out above, the court's decision was partly based on the erroneous assumption that under neither Act may intoxicating liquor be possessed without a permit. Section 33, Title II, of the National Prohibition Act provides that one may possess liquors without a permit in his private

dwelling so long as such liquors are for use only for the personal consumption of the owner, his family, and bona fide guests. Such liquors, however, may not be sold. It is readily apparent therefore why Congress limited a warrant for the search of a private dwelling under the National Prohibition Act to evidence of sale. But no such provision is found in the Alaska statute. Under it no liquors may be possessed in a private dwelling or elsewhere without a permit. Necessarily, in order that all the provisions of that statute could be enforced, the search-warrant provisions had to be made as broad as the acts forbidden. This Congress attempted to do in Section 17. It made no distinction between private dwellings and other buildings. To hold that said section has been repealed and thus restrict warrants for the search of dwellings to evidence of sale only would leave many offenses unpunished. It would defeat many of the drastic provisions of the Act. The manufacturing, storage, use, and exchange of alcoholic liquors in a private dwelling, although forbidden by the Act, could be carried on with impunity and no search warrant could issue to secure evidence on which to base a prosecution unless there was also a sale. Obviously this can not have been the intent of Congress. It is not in keeping with the purpose to provide a genuine prohibition statute for Alaska. Congress did not intend

by the later statute to legalize acts which it had previously forbidden.

We see no reason for holding that Section 25, Title II, of the National Prohibition Act, which provides for searches and seizures under that Act, is inconsistent with or that it repeals Section 17 of the Alaska Dry Law. Search warrants issued under the latter statute sufficiently safeguard the rights of the accused, since they can not be issued, except upon probable cause, the same as under the National Prohibition Act. (Secs. 2488, et seq., Comp. Laws of Alaska, 1913.) If the Alaska law and the penalties provided thereunder are not repealed, as the court below had previously held, certainly it would seem that the search-warrant provisions and the procedure thereunder are not repealed.

We think that the Dry Law of Alaska remains in force, just as do the prohibition laws of the states, and that the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaska statute than it does the state acts. It apparently was the intention of Congress that both Acts should remain in full effect, one a special act for Alaska and the other a general law for the United States as well as for the Territory of Alaska.

The cases of *Vigliotti* v. *Commonwealth of Pennsylvania*, 258 U. S. 403, and *Kennedy* v. *United States*, 265 U. S. 344, are in point. In the former this Court held that a state law of May 13, 1887,

known as the Brooks Law, which prohibits the sale of spirituous liquor without a license, was not at variance with but rather in aid of the provisions of the Eighteenth Amendment and the National Prohibition Act, and was not superseded by them. In the latter it was held that the portion of the Act of July 23, 1892, as amended, which made possession of intoxicating liquor in the Indian country an offense and fixed its punishment, was not repealed, superseded, or modified by the National Prohibition Act.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

WILLIAM D. MITCHELL,
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JANUARY, 1927.

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